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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 508

THE FLYING TIGER LINE INC.,

Petitioner,

—v.—

CHARLES S. MURPHY, *et al.*, as individuals and as members of the Civil Aeronautics Board,

—and—

TRANS WORLD AIRLINES, INC.,

Respondents.

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO CERTIORARI

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Question Presented

Whether regulations adopted by the Civil Aeronautics Board validly define and limit charter services to be performed by air carriers holding route certificates, when the statute provides that such services may be performed "under regulations prescribed by the Board."

Statement

The opinion and decision of the District Court, 244 F. Supp. 889 (D. D. C. 1965), and *per curiam* affirmance by the United States Court of Appeals for the District of Columbia Circuit (Petition, Appendix A, p. 1a) uphold the validity of regulations adopted in rule-making proceedings of the Civil Aeronautics Board in so far as they limit the passenger charter operations of Petitioner, The Flying Tiger Line Inc.

Petitioner is the holder of a certificate of public convenience and necessity authorizing it to engage in air transportation over regular routes carrying property and mail—but not passengers. This certificate makes no provision concerning charter trips, or for carriage of traffic other than property and mail; any authority to perform passenger charter services is based solely on Section 401 (e)(6) of the Federal Aviation Act of 1958, as amended (49 U. S. C. §1301 et seq.).

Section 401(e)(6) provides that an air carrier holding a route certificate may perform charter trips, without regard to the points named in its certificate, or the type of service provided therein, "under regulations prescribed by the Board." Section 401(e)(6) originally authorized the holder of a certificate to perform such operations "without regard to the points named in its certificate, under regulations prescribed by the Board." The 1962 amendment of the statute inserted the words "or the type of service provided therein" following the word "certificate".

Regulations adopted by the Board pursuant to this statutory power limit the quantity of charter trips and special services, which are authorized under Section 401(e)(6).

In adopting amended regulations to correspond with amended Section 401(e)(6) the Board used the expression "off-route" to describe the charter services over which it was exercising its regulatory authority and defined this term as including any passenger charter trips by holders of certificates which do not authorize the carriage of passengers. Thus the Board pursuant to Section 401(e)(6) authorized Petitioner to conduct passenger charter operations, a right that it did not have under its certificate, but limited the quantity of such operations to be performed as it did other "off-route" charters.

Petitioner attacked the validity of these regulations in a suit for a declaratory judgment and an injunction, contending that the distinction drawn by the regulations between "on-route" and "off-route" services of all-cargo carriers is invalid. TWA was permitted to intervene.

ARGUMENT

What appear to have been the Petitioner's principal arguments for the granting of the writ were the pendency of a petition for certiorari in another case arising out of the same administrative rule-making proceeding (*American Airlines, Inc. et al.* v. *Civil Aeronautics Board,* No. 304, October Term, 1966) and some of the identical arguments there advanced which were adopted by Petitioner (Petition, pp. 10-11, 24-26). Since the present petition was filed, the petition in No. 304 has been denied by the Court (see page 6 of this brief). Consequently, Petitioner is left solely with a reargument of matters raised before the Board, the District Court and the Court of Appeals. The decisions of the Board and the courts below were clearly correct. Moreover, Petitioner has made no showing that

there is any important Federal question for this Court to consider.

A. *No Problem Affecting Rights Under Petitioner's Certificate Is Presented.*

Petitioner's certificate of public convenience and necessity is not the source of authority to operate passenger charter trips or any other passenger services. It contains no reference to such services. Any authority Petitioner has to perform these services can come only from the statute—and the only section it can refer to is Section 401(e)(6).

The Petitioner asserts that its statutory rights to operate passenger charter trips were unduly restricted by the formula limiting the volume of such trips; but it disregards both the statute and its certificate by further asserting that any such rights are "incorporated into" or "contained within" its certificate (*cf.*, Petition, p. 3 and p. 25). No question of modification or amendment of Petitioner's certificate is here involved. The sole question below was whether regulations prescribed by the Board pursuant to the statute are valid. The decision was simply that the Board did not exceed its statutory power in prescribing the regulations.

Petitioner has two kinds of operating rights: (1) to carry property and mail under its certificate, and (2) to operate charter or special flights pursuant to Section 401 (e)(6) without regard to its certificate but *under regulations prescribed by the Board.* Only the latter operations are here involved. Petitioner's certificate does not even mention passenger operations of any kind and it has authority to conduct passenger operations in charters only by virtue of Section 401(e)(6).

Board regulation of Petitioner's non-certificated passenger charter services is authorized by the statute.*

B. *Claims That the Regulations Discriminate Against All-Cargo Carriers Were Properly Overruled.*

Petitioner claims that the regulations discriminate against all-cargo carriers and in favor of combination carriers. This is not the case.

Combination carriers are authorized to carry passengers (as well as property and mail) under their certificates; all-cargo carriers are not so authorized. This difference exists entirely apart from Section 401(e)(6) and the regulations under it. It results from the certificate authorizations sought by the respective carriers and issued by the Board. The regulations under Section 401(e)(6) recognize and take account of this difference. They do not create it.

The regulations here in question relaxed the distinction between the two types of carriers by allowing the all-cargo carriers to operate passenger charters and special services, but limited the quantity of such non-certificated services. The quantity of non-certificated or "off-route" services of combination carriers is similarly limited by the regulations.

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* Petitioner's entire argument is really based on its claim that its passenger charter operations are not "off-route" and that the Board therefore should not include them in its definition of "off-route". This puts form above substance. It is not important whether Petitioner's passenger operations are "off-route" in the dictionary sense. This term itself is not used in the statute and is used in the regulations as a defined term only. If literally descriptive labels were thought necessary, the Board could have used such words as "non-certificated" or "otherwise unauthorized" to designate the services authorized under Section 401(e)(6) and which it was regulating thereunder. The substance of the regulations would not have been changed. Problems of semantics or choice of apt labels raise no important Federal question.

Petitioner's further contention that the particular limitation on the volume of its passenger charter operations contained in the regulations unduly restricts such operations (and that it is "arbitrary and capricious") is an effort to induce the courts to substitute their judgment for the discretion exercised by the Board. The Board's action is properly upheld by the decision below because it is warranted by the record and has a reasonable basis in the law. *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 153-154 (1946); *NLRB* v. *Hearst Publications,* 322 U. S. 111, 130-131 (1944); *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939).

C. *Denial of the Petition in No. 304 This Term Disposes of Other Contentions in the Present Case.*

The Petition asserts that its contentions concerning administrative law and procedure parallel those of the petition in *American Airlines, Inc., et al.* v. *Civil Aeronautics Board,* No. 304, October Term, 1966 (commonly known as "the blocked space case"). This Court denied the petition for a writ of certiorari in No. 304 on September 10, 1966.

The contentions of the present Petition are far less compelling than those in No. 304, because, as pointed out above, the present case involves no amendment or modification of certificate rights. Denial of the petition in No. 304 *a fortiori* disposes of the same contentions which this Petitioner purported to adopt.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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